

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D437/2008

CATCHWORDS

Domestic Building, sub-contract to apply render, quality of render, terms of contract, claim and counterclaim dismissed, application for costs under s112 of the *Victorian Civil and Administrative Tribunal Act 1998*, absence of applicant from costs hearing

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| APPLICANT | Faris Matti |
| RESPONDENT | Richard Girstun |
| SECOND APPLICANT BY COUNTERCLAIM | Tamara Mecmejerski |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member M. Lothian |
| HEARING TYPE | Hearing |
| DATE OF HEARINGS | 28 October and 19 December 2008 regarding the substantive matters and 20 January 2009 regarding costs. |
| DATES OF ORDERS | 19 December 2008 and 20 January 2009 respectively |
| DATE OF REASONS | 4 March 2009 |
| CITATION | Matti v Girstun (Domestic Building) [2009] VCAT 357 |

ORDER

I direct the Principal Registrar to send the Applicant a copy of ss 120 and 126 of the *Victorian Civil and Administrative Tribunal Act 1998* and a copy of the standard statutory declaration that is provided to parties seeking to re-open proceedings under s120 and to send copies of those documents to the other parties.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

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| For Applicant: | In person on 28 October 2008, represented by Mr Ring, agent, on 19 December 2008, no appearance on 20 January 2009. |
| For Respondent | In person |
| For Joined Party | In person on 28 October 2008. No appearance on 19 December 2008 and 20 January 2009. |

REASONS

- 1 I provide these reasons for both the substantive decision of 19 December 2008 and the costs decision of 20 January 2009 in response to a request by the Applicant, Mr Faris Matti in his letter to the Tribunal of 13 February 2009. Mr Matti was present on 28 October 2008, the first day of hearing, represented by his agent, Mr Ring on the second day, 19 December 2008 and was unrepresented at the costs hearing.

THE SUBSTANTIVE DECISION

- 2 Mr Matti applied tender to a home in Sunridge Place, Berwick. The Respondent, and first applicant by counter-claim, is Mr Richard Girstun. He was the builder for the project and entered the contract with Mr Matti. The second applicant by Counterclaim, Ms Tamara Mecmejerski, owned the home and is Mr Girstun's daughter. She has since sold it.
- 3 Mr Matti said that the contract price was \$17,325.00 of which he has been paid \$5,000.00. His claim was for the amount he said was the outstanding balance of \$12,325.00. Mr Girstun said the contract price was only \$5,000.00 and it was paid in full. Mr Girstun and Ms Mecmejerski said that the work was not done properly and the loss suffered, based on either the cost to rectify or diminution of value of the home, was \$14,245.00.

Mr Matti's claim

- 4 In support of his submission about the contract sum, Mr Matti provided a page from a book of invoices, which is tax invoice 0073. It is dated "07.09.04" - although the month appears to have been "08" originally and was then written over - but the important aspect is its position in the invoice book for that financial year. The invoice before it is for 29 June 2004 and the first invoice in the book for the next financial year is dated 6 June 2004. I found that this page, which would otherwise have supported Mr Matti's evidence that the contract sum was \$17,325.00 based on \$35 per square meter, is not genuine and has been created recently by Mr Matti. I note that Mr Matti did not explain how he could have given a quotation to Mr Girstun that was out of order in his invoice book.
- 5 I accept that \$5,000.00 for this job is a very low price. In answer to my question, Mr Arends, expert witness for Mr Girstun and Ms Mecmejerski, said that he expected the cost of rendering such a home to be in the range of \$12,000.00 to \$15,000.00. However my role was not to determine a fair price, but to enforce the contract between Mr Matti and Mr Girstun.
- 6 I did not accept Mr Matti's evidence, or the evidence given on his behalf, and dismissed his claim for an allegedly unpaid contract sum.

Mr Girstun's and Ms Mecmejerski's claim

- 7 Overall the work was acceptable, however there were some streaks, white patches, a few areas of peeling render and some minor areas of poor

application. It was not necessary for me to decide whether these aspects of the work were the fault of Mr Matti, and their value, because neither Mr Girstun nor Ms Mecmejski proved that they had suffered a loss through Mr Matti's alleged breach of contract. They did not repair the work before the home was sold, and Ms Mecmejski asserted, but gave no evidence, that the price obtained when she sold her home was less than the price she would have received if the defects were not present. I therefore also dismissed the counter-claim.

THE COSTS DECISION

8 After I pronounced the substantive decision on 19 December 2008, Mr Girstun sought his costs and produced an offer to Mr Matti, dated 3 October 2008. The substance of the offer was that each party release the other from the claim and counterclaim and bear their own costs. I read the offer out to Mr Ring and briefly explained offers under s113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998*. I said:

I am going to make sure you have a copy of the offer and a copy of s112 of the VCAT Act and suggest Mr Matti get some advice about the effect of the offer.

9 Copies of the offer and s112 were provided to Mr Ring during the hearing and in his presence an attempt was made to fix a time for hearing the costs question on a date when Mr Matti could be present. Mr Matti wrote to the Tribunal on 16 December 2008 to authorise Mr Ring to appear on his behalf and to say that he and his family would be in the Philippines on 19 December 2008.

10 During that hearing Mr Ring said he thought Mr Matti would be away for "at least four weeks", then "between four and five weeks". Four weeks from 19 December would have been 16 January 2009 and the hearing was four days later, on 20 January 2009. Nevertheless, I intended that the matter be heard in mid-February and therefore ordered that Mr Girstun file and serve his statement of facts and contentions by 30 January 2009. Unfortunately, the costs hearing was fixed for hearing on 20 January 2009 and, without picking up the error of the hearing date, I made an amending order that the statement of facts and contentions be filed and served by 16 January 2009.

11 Mr Matti did not appear and was not represented at the costs hearing of 20 January 2009 and on that occasion I made the following findings:

I am satisfied that the Respondent made an offer to the Applicant on 3 October 2008 which was that the parties release each other and bear their own costs. The offer was expressed to be in accordance with sections 113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998* and was in accordance with the provisions of those sections. The result, which was that the claim by the Applicant and the counter-claim by the Respondent were dismissed is, in my opinion, not more favourable to the Applicant than the offer.

- 12 On that basis I ordered that Mr Matti pay Mr Girstun's costs of the claim and counter-claim from the deemed day of service of 8 October 2008, either to be agreed or to be assessed by the principal registrar on a party-party basis on County Court scale B.
- 13 I note that Mr Matti has not made an application for review and re-hearing of the costs decision under s120 of the VCAT Act. I direct the Principal Registrar to send him a copy of that section, a copy of s126, which enables time limits to be extended, and a copy of the standard statutory declaration that is provided to parties seeking to re-open proceedings under s120. Copies of these documents must also be sent to the other parties.

SENIOR MEMBER M. LOTHIAN